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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION
OF WISCONSIN, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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TABLE OF CONTENTS

Page

ARGUMENT:

I. Smith v. Illinois Bell Telephone Company Is Irrelevant To The FCC's Jurisdiction Under The Communications Act Of 1934.. 2

II. The Communications Act Of 1934 Excludes FCC Jurisdiction To Prescribe Exchange Charges In The Guise Of Flat End User Access Charges..... 3

III. Communications Act Excludes FCC Jurisdiction To Initiate Rates Or Tariffs By Connecting Carriers For Intrastate Or Exchange Service..... 10

IV. Certiorari Should Be Granted To Decide Whether Competition Is In The Public Interest Or Of Advantage To Subscribers In The Regulation Of Telephone Companies..... 13

TABLE OF AUTHORITIES

Cases

Page

American Tel. & Tel. Co. v. FCC,
487 F.2d 864 (D.C. Cir., 1973)..... 11

Arizona Grocery Co. v. Atchison,
T. & S. F. R. Co.,
284 U.S. 370 (1932)..... 11

Cincinnati Bell Telephone Co. v. PUC,
12 Ohio St. 3d 280, 466 N.E.2d
848 (1984)..... 15

Essential Communications Systems, Inc.,
& American Tel. & Tel. Co.,
610 F.2d 1114 (3rd Cir. 1979).....11,12

FCC v. RCA Communications, Inc.,
346 U.S. 86 (1953)..... 16

Georgia v. Pennsylvania R. Co.,
324 U.S. 439 (1945).....11,12

Lodi Telephone Co. v. Public Service
Comm.,
262 Wis. 416, 55 N.W.2d 379 (1952). 18

MCI Communications, Inc. v. American
Tel. & Tel. Co.,
708 F.2d 1081 (7th Cir. 1983)..... 11

McLean Trucking Co. v. United States,
321 U.S. 67 (1944)..... 16

Nader v. FCC,
520 F.2d 182 (D.C. Cir., 1975)..... 9

New England Tel. & Tel. Co. v. Public
Utilities Comm. of Maine,
742 F.2d 1 (1st Cir., 1984)..... 15

Page

Smith v. Illinois Bell Telephone Company, 282 U.S. 133 (1930)..... 2,3

South, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324 (8th Cir., 1980)..... 11

Southwestern Bell Telephone Co. v. Arkansas PSC, 738 F.2d 901 (8th Cir., 1984)..... 16

United States v. American Tel. & Tel. Co., 552 F.Supp. 131 (D.C. D.C.)(1983).. 5,12

United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1895)..... 12

Virginia State Corporation Commission v. FCC, 737 F.2d 388 (4th Cir., 1984)..... 15

Wisconsin Power & Light Co. v. Public Service Comm., 45 Wis.2d 253, 172 N.W.2d 639 (1969) 17

Statutes and regulations

Communications Act of 1934,
47 U.S.C. § 151 2
§ 152(b)(1)..... 6
§ 153(c)..... 7
§ 154(i)..... 10
§ 203..... 11
§ 205..... 11
§ 205(a)..... 8,9
§ 213..... 8
§ 214..... 9

Page

§ 214(a)..... 8
§ 220..... 8
§ 221(a)..... 9
§ 221(b)..... 4,6
§ 221(b)(c)(d)..... 3
§ 223..... 7

Miscellaneous

Amendment to Part 31, Uniform System of Accounts, 92 FCC 2d 864 (1983)..... 15

H.R. Rep. 456, 66th Cong. 1st Sess. 11 (1919)..... 13

H.R. Conf. Rep. No. 650, 66th Cong. 2nd Sess. 64-65 (1920)..... 13

Third Report and Order, 93 FCC 2d 241 (1983) recon. 48 Fed. Reg. 42, 984 (1983) further recon. 49 Fed. Reg. 7810 (1984)..... 2

Transportation Act of 1920, Ch. 91, 41 Stat. 456 (1920)..... 12

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

The Petitioners, Public Service Commission of Wisconsin, State of Michigan, and Michigan Public Service Commission reply to the Briefs in

Opposition to a Petition for Certiorari filed by the Bell Operating Companies (BOC's), American Telephone & Telegraph Co. (AT&T), and the Federal Communications Commission (FCC) pursuant to Rule 22.5 of the Rules of this Court, to rebut various arguments first raised in the briefs in opposition.

I. Smith v. Illinois Bell Telephone Company is Irrelevant to the FCC's Jurisdiction Under the Communications Act of 1934.

Petitioners wish to make clear that the issue for which certiorari is sought is whether the FCC's Access Charge Decision[1] is within the FCC's jurisdiction under the Communications Act of 1934, 47 U.S.C. § 151 et. seq. The issue is not as suggested by the BOC's whether the Access Charge Decision is consistent with the Court's decision in Smith

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[1] Third Report and Order, 93 FCC 2d 241 (1983) recon. 48 Fed. Reg. 42, 984 (1983) further recon. 49 Fed. Reg. 7810 (1984).

v. Illinois Bell Telephone Company, 282 U.S. 133 (1930).[2]

II. The Communications Act of 1934 Excludes FCC Jurisdiction to Prescribe Exchange Charges In the Guise of Flat End User Access Charges.

The Bell Operating Companies (BOC's) argue that the Court should disregard the statutory limits on FCC jurisdiction in 47 U.S.C. § 221(b)(c)(d) on the grounds that the FCC has some independent jurisdiction to allow recovery of interstate costs. The BOC's maintain that since the costs which are to be recovered are interstate, it follows that only the FCC has authority to prescribe the charge. This argument erroneously assumes the states exercise no authority over interstate costs under the Communications Act. Congress was aware in 1934 because of the Smith decision

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[2]BOC Brief in Opposition, p. 2.

that exchange plant was used interchangeably for interstate toll and local exchange purposes. Nevertheless, Congress created a statutory scheme which defined exchange service as separate from interstate toll service, and left it to the states to regulate exclusively, regardless of whether the costs were interstate or intrastate. Congress obviously intended that exchange subscribers would pay only one charge for access and that charge would be the exchange service charge, "even though a portion of such exchange service constitutes interstate or foreign communication." 47 USC § 221(b). Even if the costs are interstate, therefore, it does not follow that only the FCC has jurisdiction to prescribe the rates. Congress left the exclusive jurisdiction over subscriber exchange or exchange access to the states.

Petitioners do not agree that nontraffic sensitive costs can be considered interstate costs. Defining the nontraffic sensitive costs of connecting carriers as interstate would render the exemptions of the Communications Act totally meaningless, and would make all connecting carriers common carriers only because they furnished interstate toll service of other carriers.

It would also violate the prohibition of the Modified Final Judgment in United States v. American Tel. & Tel. Co., 552 F.Supp. 131, 226-234 (D.C. D.C.) aff'd., 460 U.S. 1001 (1983) against the Bell operating companies (BOC's) furnishing interexchange, interstate services. Under the MFJ, its BOC's were divested of assets used to perform interexchange functions. They were specifically prohibited from providing any other service than exchange or exchange access

functions that were not natural monopoly services regulated by tariff. Even multifunctional assets which were predominantly used for interexchange purposes were transferred to AT&T in the Plan of Reorganization, leaving the BOC's to obtain the use of such facilities through lease or contract. 552 F.Supp. at 206-207. The only facilities used in providing interstate services are leased or contracted out to interstate common carriers. Thus, the MFJ precludes the BOC's from having interstate costs in their rate bases.

Connecting carriers are by definition engaged in intrastate communication services under 47 U.S.C. §152(b)(1) and exchange service under 47 U.S.C. §221(b) for which charges, classifications, practices, services, facilities and regulation are separate from services, charges, facilities, etc., used in

interstate common carriage. The Communications Act excludes communication or transmission between two points within a state, 47 U.S.C. §153(c).[3] The Act also excludes from the definition of interstate line "a channel of communication established

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[3]"Interstate communications" or "interstate transmission" means communication of transmission (1) from any State, Territory, or possession of the United States (other than the [Philippine Islands and] the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than [the Philippine Islands and] the Canal Zone), or the District of Columbia, (2) from or to the United States to or from [the Philippine Islands or] the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act (other than section 223 thereof [47 USCS § 223] include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission. (emphasis added)

by the interconnection of two or more existing channels" in 47 U.S.C. §214(a).

It is not sufficient that plant used interchangeably for interstate transmission and intrastate transmission in order to classify the associated costs as interstate. The FCC only has authority to classify and value interstate toll costs of common carriers.

The FCC has no authority to value an intrastate or exchange rate base, make accounting adjustments or prescribe depreciation rates for connecting carriers. Connecting carriers are not subject to the Act for these purposes. 47 U.S.C. §§ 213, 220. In order for the FCC to prescribe charges under 47 U.S.C. § 205(a), it is necessary that a carrier be engaged in interstate communications other than through connection to another interstate carrier or that the

carrier be controlled by an interstate carrier. A prescription of charges under § 205(a) requires the establishment of a rate of return, setting the level of depreciation and other expenses and determining a rate base, under cost of service rate regulation. Nader v. FCC, 520 F.2d 182, 204 (D.C. Cir., 1975).

Petitioners maintain there are only two ways a connecting carrier can be made "subject to the Act" and to the FCC's authority. A connecting carrier may become subject to the Act if it is acquired through a merger, consolidation or like means where the acquisition is approved under 47 U.S.C. §221(a), the Willis-Graham Act, after notice and hearing to the States. Or, the connecting carrier may be granted authority under 47 U.S.C. §214 to construct an interstate toll line. Neither of these circumstances exist in

the Access Charge Decision. Consequently, there is no basis for classifying the nontraffic sensitive costs of connecting carriers interstate.

III. Communications Act Excludes FCC Jurisdiction To Initiate Rates Or Tariffs By Connecting Carriers for Intrastate or Exchange Service.

Contrary to the federal brief in opposition,[4] section 4(i) of the Communications Act, 47 U.S.C. §154(i), does not override the express limitations of §§203 to 205 which preclude the FCC from initiating rates or authorizing anticompetitive conduct.

The FCC has no jurisdiction to make connecting carriers subject to its authority by requiring the filing of common tariffs and rates or creating a carrier association for the administration of common tariffs as

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[4]Federal Respondents' Brief in Opposition, p. 5-6.

revenue pools. The statutory scheme set forth at 47 U.S.C. §§203 to 205 of the Communications Act, having been modelled after similar provisions in the Interstate Commerce Act, was intended to preserve carrier initiative in filing rates and tariffs. MCI Communications, Inc. v. American Tel. & Tel. Co., 708 F.2d 1081, 1104 (7th Cir. 1983); South, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324, 1330 (8th Cir., 1980); Essential Communications Systems, Inc., & American Tel. & Tel. Co., 610 F.2d 1114, 1119-1120 (3rd Cir. 1979); American Tel. & Tel. Co. v. FCC, 487 F.2d 864 (D.C. Cir., 1973); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 459 (1945); Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U.S. 370, 383-384 (1932). These provisions in the Interstate Commerce Act have been interpreted by this Court as not authorizing compulsory common rates and

tariffs, or compulsory participation in pooling associations, or rate bureaus, which are considered per se unlawful under the Sherman Act, 15 U.S.C. §1 et. seq. Georgia v. Pennsylvania R. Co., 324 U.S. at 458-459; United States v. Joint Traffic Assoc., 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1895). The commission lacks authority to authorize or immunize conduct which would be violation of the antitrust laws. United States v. American Tel. & Tel. Co., 552 F.Supp. 131, 157 (D.C. D.C.) aff'd., 460 U.S. 1001 (1983); Essential Communication System, Inc. v. American Tel. & Tel. Co., 610 F.2d at 1118 (3rd Cir. 1979). As the latter case notes, the Transportation Act of 1920, Ch. 91, 41 Stat. 456 (1920), which authorized anticompetitive conduct by railroads left telecommunications industry fully subject to

the antitrust laws. See H.R. Rep. 456, 66th Cong. 1st Sess. 11 (1919); H.R. Conf. Rep. No. 650, 66th Cong. 2nd Sess. 64-65 (1920). The Communications Act did not change the status of the telecommunications industry under the antitrust laws.

The FCC accordingly has no authority to authorize price fixing. Nor does it have the authority to order common or joint tariff filings by carriers particularly those not subject to its jurisdiction. Nor does it have the authority to authorize rate associations for purposes of drafting and filing the tariffs and administering the revenue pools. These actions are all types of anticompetitive conduct which the FCC lacks jurisdiction to authorize.

IV. Certiorari Should Be Granted to Decide Whether Competition is in the Public Interest or of Advantage to Subscribers in the Regulation of Telephone Companies.

The Briefs in Opposition also contend that it is either inappropriate for this Court

or any other Court to review the FCC's attempts in redefining federal and state jurisdictional boundaries over telephone regulation.[5] Even if it is appropriate, they argue that this is neither the time nor place to raise such an issue.[6]

Petitioners submit that this Court is the proper place to seek review of agency actions which have placed improper reliance on competition in telecommunications. The agency's reliance on competition in

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[5]Federal Respondents Brief in Opposition, p. 12; Bell Operating Company Brief in Opposition, p. 24-26; American Telephone & Telegraph Co. Brief in Opposition, p. 13-14.

[6]AT&T Brief in Opposition, p. 14.

interstate services is a recurring theme in a number of other actions besides this case, review of which are now pending before this Court.

Each of these cases involves FCC actions which are for the explicit purpose of promoting competition in interstate common carrier communications. Thus, in Amendment to Part 31, Uniform System of Accounts, 92 FCC 2d 864 (1983) affirmed sub nom Virginia State Corporation Commission v. FCC, 737 F.2d 388 (4th Cir. 1984), appeal and petitions for certiorari pending Nos. 84-871, 84-889, the FCC preempted state commission depreciation policies and rates as a means of allowing faster depreciation and higher rates in order to further competition. But contra Cincinnati Bell Telephone Co. v. PUC, 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984) appeal pending No. 84-623; New England Tel. & Tel. Co. v.

Public Utilities Comm. of Maine, 742 F.2d 1 (1st Cir., 1984); and in Southwestern Bell Telephone Co. v. Arkansas PSC, 738 F.2d 901 (8th Cir., 1984), petition for certiorari pending No. 84-483 the policy of promoting competition was held to be enforceable by district court injunction action.

Petitioners consider the Commission's actions in each of these cases to run directly counter to this Court's efforts in FCC v. RCA Communications, Inc. 346 U.S. 86, 94-97 (1953), McLean Trucking Co. v. United States, 321 U.S. 67, 86-88 (1944) and other cases to prevent agencies like the FCC from substituting market competition for regulatory duties. By either automatically assuming interstate common carrier competition to be in the public interest in each of the above cases including the Access Charge Decision, the commission has violated the

standards of this Court by promoting competition as a policy goal and end in itself, rather than relying on it for auxiliary or complementary support to promote the public interest.

The promotion of competition has led the commission to extend its authority over local regulation by attempting to regulate local and intrastate telecommunications competition. The public interest, convenience and necessity on the local, intrastate level, is comparable to the public interest standard in the Communications Act, in that neither competition nor monopoly are the goals of regulation. States such as Wisconsin, for example, permit competition in the extension of local exchange lines where it is affirmatively demonstrated to promote the public interest advantage to consumers of utility service. Wisconsin Power & Light Co.,

v. Public Service Comm., 45 Wis.2d 253, 259-260, 172 N.W.2d 639 (1969). For the same reasons, competition might not be allowed where it results in a wasteful and unnecessary duplication of service. Lodi Telephone Co. v. Public Service Comm., 262 Wis. 416, 421, 55 N.W.2d 379 (1952). The goal of regulation thus is neither competition nor monopoly, but the public interest and generally speaking, the benefits to consumers. The FCC presumes to supercede these standards by encouraging or discouraging local exchange company bypass depending on whether it is economic or uneconomic, not whether it benefits consumers. Similarly, its preemption of state depreciation policies and rates is not to benefit consumers but to promote conpetition.

Needless to say, review of such unlawful agency action does not require judicial legislation. The Court has a long tradition

of restraining agency actions which attempt to redefine the agency's role in disregard of express statutory limitations. Certiorari should therefore be granted to the Court of Appeals to review these questions.

RESPECTFULLY SUBMITTED,

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